FEB 25 1955
HAROLD B. WILLEY,

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 620

R. A. ROGERS, also known as Roy A. Rogers,
Petitioner,

vs.

NOEL S. ALTON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the District Court of Appeal of the State of California,
in and for the First Appellate District,
Division One Thereof.

R. A. ROGERS,
5188 Coronado Avenue, Oakland 9, California,
Petitioner in Propria Persona.

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PETITION FOR A WRIT OF CERTIORARI

to the District Court of Appeal of the State of California, in and for the First Appellate District, Division One Thereof.

Petitioner respectfully petitions this Honorable Court for a hearing and the issuance of a writ of certiorari to the District Court of Appeal of the State of California, First Appellate District, Division One thereof after denial of hearing by the Supreme Court of the State of California.

INTRODUCTORY STATEMENT.

The decision of the District Court of Appeal has placed the stamp of fraud on petitioner, a practicing attorney in the California Courts for more than thirty-five years.

If that decision is permitted to stand, petitioner's good name, will be taken from him and he will suffer irreparable injury, professional ruin and disgrace.

Petitioner's reputation has been unblemished and unsullied for more than three decades, yet by the charges of the Appellate Court as contained in its opinion, petitioner has been saddled with heavy vindictive damages, all because a promissory note, not the note of petitioner but of a client William P. Devou was partially unpaid.

These serious consequences have been visited upon petitioner by a void judgment of the trial Court, based on a complaint which fails to state a cause of action and upon evidence wholly insufficient to establish fraud.

Moreover petitioner has been denied the right to his day in Court, denied the right to the due process of the Fourteenth Amendment to the Constitution of the United States which protects against invasion by the state through any of its branches or officers, and whose essential elements are notice, and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case and the broad policy of the law which hears before it condemns and proceeds not arbitrarily or capriciously, but upon inquiry. (*Simon v. Craft,* 182 U.S. 436, 21 S.Ct. 836,

45 L.Ed. 1165; *Railroad Commission of California v. Pacific Gas & Electric Co.*, 302 U.S. 388, 58 S.Ct. 334, 82 L.Ed. 319.)

Petitioner was tried in absentia by reason of his being in Washington, D. C. in a matter before The Tax Court of the United States in the matter of the *Commissioner of Internal Revenue v. Irmgard Soares Santos,* the facts of which are more particularly set forth in petitioner's affidavit in support of his motion for a new trial pages 92 to 99 clerk's transcript on appeal in that certain action entitled *Noel S. Alton v. R. A. Rogers* also known as Roy A. Rogers, numbered 15,928 of the District Court of Appeal of the State of California, First Appellate District thereof and in brief are as follows:

That heretofore and on the 21st day of November, 1952 affiant was directed by his client Irmgard Soares Santos, who had at about the hour of 5 o'clock p.m. of that day received certain papers from her then attorney stating that said attorney had withdrawn from her tax case and said client insisting that petitioner ascertain from the clerk of The Tax Court of the United States what papers had been filed and what charges had been made by the government in said matter as liens aggregating several hundred thousand dollars had been assessed against petitioner's client and her husband.

That petitioner was taken by surprise by the late hour of his substitution in said tax matter and the following day being Saturday, November 22, 1952 and said office of the Tax Court of the United States,

Washington, D. C., being closed and petitioner being unable to obtain any information for his client and realizing that the case of *Alton v. Rogers* might go to a jury department on Monday, November 24, 1952, that petitioner found himself unable to notify the presiding judge of said Superior Court and by reason of the urgency of said matter and the many problems which said tax matter presented to petitioner that petitioner was unable to communicate with his counsel at said time, and petitioner being further informed by his client that November 29, 1952 was the terminal date when a motion could be made to vacate a previous order of said Tax Court consolidating the tax matters of petitioner's client and her husband and by reason of the fact that petitioner's client had no papers pertaining to said tax matters, and petitioner and his client being wholly ignorant of the basis of taxes claimed by the government and at the insistence of petitioner's client, petitioner left for Washington, D. C. hoping to be able to complete certain preliminary matters and return for said trial.

That petitioner before leaving found himself unable to use any means such as the long distance telephone or the Western Union telegraph to obtain any relief for his client, it being long after office hours in Washington, D. C., on Friday, November 21, 1952 when petitioner was informed by his client of her predicament.

That by reason of Thursday, November 27, 1952 of the following week being Thanksgiving and petitioner's appearance having to be filed and a motion

made to set aside an order of consolidation of certain tax matters in said Tax Court and petitioner being wholly ignorant of the complicated situation forthwith departed for Washington, D. C.

That petitioner's counsel made a request for a reasonable continuance of the trial of said action on Monday, November 24, 1952 which request was promptly denied by said Court.

That the refusal of a reasonable request for a continuance of the trial of said matter when such serious charges had been made against petitioner and while petitioner was engaged in legal work in Washington, D. C., was an abuse of discretion by the trial Court and was arbitrary, capricious and unjust and deprived petitioner of his day in Court.

That although the trial of said matter did not take place until December 2, 1952, petitioner found himself unable to leave Washington, D. C. by reason of certain hearings in said tax matters and so notified his attorney, who petitioner is informed notified the presiding judge, requesting a reasonable continuance to permit petitioner to return for said trial and offer his defense to respondent's charges, but that said request for a reasonable continuance of said trial based on the affidavits of petitioner and his said attorney was denied by said Court.

That the denial by said Court of petitioner and petitioner's attorney's request for a reasonable continuance was an abuse of discretion by said Superior Court and was arbitrary, capricious and unjust and

did deprive petitioner of his day in Court to refute the serious charge and exorbitant demands made against him by respondent.

That at the time of requesting said continuance petitioner's counsel was without any of the papers, files or records necessary for the trial of said action and having been in said case but a short while before said trial was wholly unfamiliar with matters involved, which covered a period of eleven years more or less.

That respondent gave false testimony at the time of said trial as to the amount of money loaned by him to William P. Devou, in this that respondent testified at said time that the amount loaned by him to Devou was the sum of $4,150 whereas in truth and in fact said sum so loaned by respondent on October 27, 1941 was the sum of $3,000 and that respondent was to receive a bonus of $1,450 for such loan as is more fully set forth in petitioner's affidavit and amendment thereto in support of his motion for a new trial, pages 98 and 99 clerk's transcript on appeal.

That petitioner by his affidavit in support of his motion for a trial page 104 clerk's transcript terminated any relation of attorney and client with respondent on August 21, 1941 and respondent's loan to Devou was not made until October 27, 1941, so that there was no confidential relation between petitioner and respondent from and after August 21, 1941.

That petitioner specifically refers to pages 106 to 124 of his affidavit in support of his motion for a new

trial of the reporter's transcript and exhibits thereafter attached for petitioner's statement of the facts involved.

That at all times while acting as counsel for William P. Devou petitioner followed the instructions of his client.

Petitioner cites this honorable Court to page 102 reporter's transcript line 26 as to the testimony of respondent in a meeting with Devou, which is in great variance with the facts as set forth by petitioner pages 106 to 111 reporter's transcript.

Petitioner sets forth a letter of December 1, 1943, page 113 of reporter's transcript and particularly refers to Exhibit No. 3 as therein set forth which is attached to said exhibits pages 125 to 126 reporter's transcript.

Again at page 95 reporter's transcript respondent testified that the loan of two sums of money was a loan to petitioner for Mr. Devou. This petitioner denies ever having received two sums of money or any other sum of money from respondent for William P. Devou.

That on appeal to the District Court of Appeal, State of California, First Appellate District, that Court held that a confidential relationship existed between appellant and respondent, when no such relationship existed from August 21, 1941, and said Appellate Court further ordered the first judgment which it characterized as "void" be stricken from the record and appellant's appeal therefrom dismissed and the second judgment of January 16, 1953, (which was a

separate judgment on a second count of the complaint) was ordered modified by incorporating therein in toto the first judgment of December 4, 1952. The Appellate Court in its judgment further ordered the verdict of December 3, 1952, and the findings, conclusions and judgment of January 16, 1953, as modified, because of an error in computations, is further modified by reducing the award for $6,939 to $6,767.37. It further ordered that the ends of justice require that respondent the plaintiff therein recover costs on both appeals.

This judgment of the District Court of Appeal was entered October 1, 1954.

No rehearing was requested by petitioner of said District Court of Appeal but thereafter and within the time allowed by law, petitioner did on November 10, 1954 petition the Supreme Court of the State of California for a hearing of his rights, claiming in said petition in the summary thereof at paragraph (7) as follows:

> "That appellant has suffered an unjust and unwarranted injury to his personal and professional reputation, heretofore unblemished, that he was denied the right to present his case and that he has been deprived of his property without due process of law and of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States."

Petitioner at page (3) of his said petition to said Supreme Court of the State of California did at said time also set forth:

"He has also been deprived of the equal protection of the laws also guaranteed by the Fourteenth Amendment.

"In spite of appellant's absence from the State and his suddenly enforced appearance before a Federal Court, and the unfamiliarity of his counsel with the evidence, his adversaries proceeded to try him in absentia, and he was deprived of the effective representation by counsel essential to due process of law. (*Powell v. Alabama,* 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158.)"

That also in the same petition petitioner set forth on pages 82 and 83 as follows:

"We believe that we have fully covered all of the twelve grounds for a hearing by this Court specified at the commencement of this petition. It is submitted that without the slightest evidence of fraud, the District Court of Appeal has affirmed a void judgment of the Superior Court, not only holding appellant liable for a debt he never did contract, but penalizing him with exemplary damages because the plaintiff had not collected the full amount of a promissory note. We submit that this result finds no precedent in any reported decision and is unparalleled in the annals of judicial procedure. It is likewise submitted that by denying appellant an opportunity to be heard, the Superior Court and the District Court of Appeal have deprived him of due process of law and the equal protection of the laws within the meaning of the Fourteenth Amendment to the Constitution of the United States. This right appellant now specially sets up and claims.

"Wherefore your petitioner respectfully prays Your Honors for an order granting a hearing

by this Honorable Court after decision by the District Court of Appeal, and that upon such hearing, the judgment of the Superior Court be reversed and the cause remanded to the Court below with directions to dismiss the action."

That thereafter and on or about November 24, 1954 Hon. Chief Justice Gibson of the Supreme Court of the State of California made an order denying petitioner's petition for a hearing.

That such denial by the Supreme Court of petitioner's petition ignored the affirmative appearance in the record on appeal that decision of a federal question presented to said Court was necessary to a determination of said cause, and that such federal question was actually decided adversely to petitioner and that the order of said State Supreme Court could not have been made without so deciding it, adversely to petitioner.

That thereafter and on November 29, 1954, petitioner made application to the District Court of Appeal, First Appellate District thereof for an order staying execution and enforcement of said judgment to enable appellant to obtain a writ of certiorari from the Supreme Court of the United States, appellant having deposited the sum of $22,198 in cash on February 13, 1953 with the County Clerk of the Superior Court of the State of California in and for the City and County of San Francisco, in lieu of an undertaking on appeal and in accordance with the California statutes in such cases made and provided,

and said sum of $22,198 is now and ever since has been on deposit with said county clerk.

That Hon. Justice Peters of said District Court of Appeal upon appellant's application for such stay of execution ordered execution on said judgment stayed for a period of ninety days from and after November 29, 1954 as follows:

> "ORDERED that if the said appellant shall file or cause to be filed a petition for a writ of certiorari to review the said judgment together with a transcript of the record and proceedings in the case as provided in subdivision I of Rule 21 of the Rules of the Supreme Court of the United States within said period of ninety (90) days, then the execution and enforcement of the judgment aforesaid be further stayed until the final judgment, order or decree of the Supreme Court of the United States in the premises; but if said petition and record be not so filed within said period of time, then this stay shall cease and determine."

It is submitted that a hearing by the Supreme Court of the United States is necessary for the following reasons:

(I) That a decision of a federal question is necessary to a determination of petitioner's rights in this:

(a) That petitioner specifically set up and claimed in his petition to the Supreme Court of the State of California the final Court in which a decision could be had, a title, right and privilege and immunity under the Constitution of the United States, to-wit, that by

the judgment and decree of the District Court of Appeal, petitioner has been deprived of his property without due process of law and of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

(b) That petitioner has been denied due process of law by the Superior Court of the State of California in and for the City and County of San Francisco in that said Court never heard nor ruled on petitioner's motion for a new trial after judgment entered against petitioner in said Court.

(c) That petitioner has been deprived of his property without due process of law and of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution o the United States by the District Court of ppeal unlawfully incorporating a void judgme in a second judgment which procedure disreg rded decrees of Courts of the United States.

(d) That petitioner has been deprived of his property without due process of law and of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States in having two judgments rendered against him on one complaint containing two counts which procedure disregarded decrees of Courts of the United States.

(e) That petitioner was denied due process of law by the trial Court in forcing petitioner to a jury trial on the first count of said complaint based on breach of trust and accounting, since these issues were essentially equitable in nature and disregarded decrees of the Courts of the United States.

(f) Petitioner has been deprived of his property without due process of law guaranteed by the Fourteenth Amendment by the District Court of Appeal affirming the judgment against petitioner on the first cause of action for the reason that said cause of action is barred by the provisions of Code of Civil Procedure of the State of California Sec. 338 sub. (4) thereof and further said cause of action is barred by waiver and disregards decrees of Courts of the United States.

(g) Petitioner has been deprived of his property without due process of law guaranteed by the Fourteenth Amendment by the District Court of Appeal affirming the judgment against petitioner on the second cause of action for the reason that cause of action is barred by the provisions of Code of Civil Procedure Sec. 338 sub. (4); said cause of action is barred by waiver; the judgment is not supported by substantial evidence and the jury was misdirected to the prejudice of petitioner and thereby disregarded decrees of Courts of the United States.

(h) Petitioner has been deprived of his property without due process of law as guaranteed by the Fourteenth Amendment in this that the pleadings and the evidence wholly fail to show that petitioner was guilty of any fraud and the affirmance by the District Court of such judgment thereby disregards decrees of the Courts of the United States.

(i) Petitioner his been deprived of his property without due process of law as guaranteed by the Fourteenth Amendment in that respondent's claims as affirmed by the District Court of Appeal was barred by the Statute of Limitations of the State of California and said judgment thereby disregarded decrees of Courts of the United States.

(j) That petitioner has been deprived of his property without due process of law as guaranteed by the Fourteenth Amendment in that the respondent in accepting a second note, which he accepted after a full disclosure, is barred from maintaining his said action, and the affirmance by the District Court of Appeal of said judgment in regard thereto disregards decrees of the Courts of the United States.

(k) That petitioner has been deprived of his property without due process of law as guaranteed by the Fourteenth Amendment in that nowhere in the evidence is there any proof entitling respondent to exemplary damages and such judgment thereby as affirmed by the Dis-

trict Court of Appeal in regard thereto disregards decrees of the Courts of the United States.

GROUNDS FOR HEARING BY THE SUPREME COURT OF THE UNITED STATES.

(1) Petitioner has been deprived of his property without due process of law and of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States in that judgments were entered against him at a time when he was absent from the State of California on a sudden enforced appearance before The Tax Court of the United States in Washington, D.C. and the unfamiliarity of petitioner's counsel with the evidence, at which time petitioner was tried *in absentia* without effective representation by counsel essential to due process of law.

(2) That by reason thereof petitioner has been denied his day in Court to interpose his defense to said action.

(3) That petitioner has claimed and specifically set up such constitutional title, immunity and privilege right in his Petition for a Hearing by the Supreme Court of the State of California in the summary of said petition and at pages 3 and 83 thereof, which petitioner respectfully refers to and makes a part of this petition.

(4) That the Supreme Court of the State of California, the highest Court to which petitioner could appeal denied his petition and in so doing could not

have made such denial of petitioner's appeal without deciding the federal question so presented by petitioner.

(5) That at the time of the trial of said action before a jury, petitioner's counsel moved for a continuance by reason of petitioner's absence in matters pending before The Tax Court of the United States in Washington, D. C., and when such motion was denied, petitioner's counsel asked permission to withdraw from said case but the trial judge insisted that said counsel remain at the trial, at which time petitioner's counsel informed said trial judge that he would remain mute and did remain mute in so far as petitioner's defense was concerned for said entire trial. That no witnesses were cross-examined by petitioner's counsel nor did petitioner's counsel participate in said trial in any way, although ordered by said trial judge to remain in attendance at said trial.

That petitioner has at times and still has a valid defense to all charges made against him by respondent but has been prevented from asserting said defense.

(6) That the complaint of respondent does not nor does either of said counts state facts sufficient to constitute a cause of action for fraud or to entitle respondent to any relief against petitioner.

(7) The evidence was insufficient as a matter of law to establish fraud on the part of petitioner.

(8) The evidence produced by respondent, both oral and documentary shows without conflict that his claim was barred by the statute of limitations.

(9) The District Court of Appeal committed error in the following particulars:

(a) In holding that the allegations of the complaint touching the discovery of the alleged fraud were sufficient and in holding that the case involves an oral voluntary and continuing trust, when the evidence conclusively negatives any theory of a trust.

(b) In upholding the action of the trial Court in submitting legal issues to a jury without first disposing of the equitable issues and over the objections of petitioner's counsel.

(c) The judgment for both compensatory and punitive damages is admittedly void and specifically stated to be void by said District Court of Appeal and its subsequent act in ordering said void judgment incorporated in a subsequent judgment thereby depriving petitioner of his property without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States.

(d) Petitioner was denied due process of law by the District Court of Appeal denying petitioner's claim that respondent's causes of action were inconsistent and that an election was required.

(e) Denying petitioner due process of law by ruling that the fraud if any, was waived by the conduct of the respondent.

(f) Denying petitioner due process of law by omitting incorrectly stated material facts in its opinion.

(g) Denial of due process of law to petitioner in denial by trial Court of petitioner's motion for a new trial.

(h) Denial of due process of law in depriving petitioner of his property in upholding award for punitive damages.

(i) Depriving petitioner of his property without due process of law in charging petitioner with compensatory and punitive damages on a loan of money made by respondent to one William P. Devou, a client of petitioner, and the acceptance by respondent of a promissory note from said Devou by respondent and the failure of respondent to show he suffered any damages by reason of said note being uncollectible or the maker thereof insolvent.

That said District Court of Appeal, First Appellate District, Division One thereof on page xxi of its decision by its own act nullified any judgment for exemplary damages against petitioner when it declared:

"For reasons already stated it is ordered that the first judgment of December 4, 1952 having been entered prematurely, is void and ordered stricken from the record and the purported appeal therefrom dismissed; the second judgment of January 16, 1953 is ordered modified by incorporating therein in toto the judgment of December 4, 1952; the verdict of December 3, 1952 and the findings, conclusions and judgment of January 16, 1953, as modified because of an error in computations is further modified by reducing the award of

$6,939 to $6,767.37. As so modified, the judgment is affirmed. The ends of justice require that plaintiff recover costs on both appeals. It is so ordered.

Peters, P. J.

Bray, J., and Wood (Fred B.), J., concurred.

Filed October 1, 1954.

If there are two judgments in a record the latter in point of time must be deemed the true and final judgment in the case. (*Galvin v. Palmer,* 134 Cal. 426, 428; *Paige v. Roeding,* 96 Cal. 388; *Von Schmidt v. Von Schmidt,* 104 Cal. 547; *Hawley v. Gray,* 127 Cal. 56.)

Accordingly the only judgment left standing is the judgment rendered by the trial judge and signed by him for $6,939. By entering this judgment, the trial Court adjudicated in effect that the sum last mentioned was all the plaintiff was entitled to recover. There is thus a legal *exeunt* of the exemplary damages.

It is unnecessary to argue further that the first judgment entered on the verdict of the jury was void. The District Court of Appeal holds that it was void. (*Alton v. Rogers,* 127 A.C.A. 810, 821.)

The Appellate Court has gone even farther than that; it has ordered the first judgment stricken from the record, "and the purported appeal therefrom dismissed".

It then proceeds to give Alton his exemplary damages by ordering the void judgment which it has just

stricken from the record, incorporated in the second judgment.

Such action of the Appellate Court is void for want of jurisdiction.

Such a judgment has been characterized as a "dead limb upon the judicial tree, which may be chopped off at any time, capable of bearing no fruit to plaintiff". (Freeman on Judgments, Vol. 1, page 645; *People v. Greene,* 74 Cal. 400; *Bass v. Katterjohn,* 194 Ky. 284, 239 S.W. 53; *Title Guaranty & Surety Co. v. Foster,* 84 Okl. 291, 203 Pac. 231; *Winina Oil Co. v. Barnes,* 83 Okl. 248, 200 Pac. 981; *In re Wooley's Estate* (Vt.), 117 Atl. 370.)

Freeman on Judgments, Vol. 1, page 644 states the law applicable to void judgments as follows:

> "The fact that the void judgment has been affirmed on review in an appellate court, or an order or judgment renewing or reviving it entered, adds nothing to its validity". (*Minnesota Thresher Mfg. Co. v. LeHeureux,* 82 Neb. 692, 118 N.W. 565; *Pioneer Land Co. v. Maddux,* 109 Cal. 633, 42 Pac. 295; *Wilson v. Montgomery,* 14 Smedes & M. (Miss.) 205; *Chambers v. Hodges,* 23 Tex. 104.)

STATEMENT OF THE CASE.

(a) The pleadings.

On February 2, 1951 the respondent Noel S. Alton filed a complaint in two counts naming as defendants therein the petitioner and William P. Devou. (C.T. 1 to 17 inclusive.)

Said complaint styled "Complaint for Damages, Breach of Trust, fraud and deceit", shows by its allegations that it wholly fails to state a cause of action on any of the grounds named and moreover it appears on its face that the purported claims of respondent were barred by the Statute of Limitations.

Defendants jointly challenged the sufficiency of the complaint by timely demurrer, both general and special. (C.T. 20.)

This demurrer was overruled (C.T. 23) and defendants then filed separate answers. (C.T. 25, 28.)

Petitioner's answer sets forth three affirmative defenses, first, that the causes of action were barred by subdivision 4 of Section 338 of the Code of Civil Procedure of the State of California; second, that by the acceptance by respondent of a promissory note dated July 23, 1949, that the alleged fraud was waived by respondent; third, that it appears on the face of the complaint that respondent's remedy if any is solely against defendant Devou on a promissory note executed by him and delivered to respondent. (C.T. 29.)

(b) The denial of petitioner's motions to drop the case from the jury calendar and for a continuance.

The cause was originally set for a trial with a jury.

The order was made by the presiding judge of the Superior Court October 28, 1952, and the trial date set for November 25, 1952.

On November 18, 1952 petitioner filed notice to drop said case from the jury calendar (C.T. 50), upon the

grounds, inter alia, that proper notice of the trial date had not been given counsel for petitioner; that no demands for a jury trial had previously been made by respondent and that "the issues framed by the pleadings herein are not triable by a jury, and therefore plaintiff is not entitled to have said issues tried by a jury".

On November 21, 1952 this motion was denied without prejudice by the Superior Court. (C.T. 53.)

The cause thereafter and on December 1, 1952 came on for trial before the Honorable Daniel R. Shoemaker, Judge of the Superior Court and before the empanelment of the jury certain proceedings took place in the judge's chambers, at which time petitioner's counsel renewed the motion for a continuance previously stated, citing a number of authorities. (R.T. I-IX.)

Having cited the authorities counsel for petitioner herein then moved the Court for a continuance of the trial to January 5, 1953 and in support of his motion filed an affidavit of petitioner made in Washington, District of Columbia, setting forth the fact that petitioner was then detained in Washington, D. C. on important legal business over which petitioner had no control, that such business was so pressing as to admit of no delay and that petitioner's counsel is not fully and thoroughly acquainted with petitioner's case and that petitioner will prove a meritorious defense to respondent's alleged action and that said application for continuance is made in good faith and not for the purpose of delay, and that respondent would

not suffer any damages or prejudice by continuing said trial to January 5, 1952. (R.T. IX-XI.)

Petitioner's counsel at said time also filed his affidavit stating he was not in possession of all of the facts of the case, the names of the witnesses or the letters and correspondence between the parties since 1941 and that the presence of petitioner was indispensably necessary, not only as a witness in his own behalf to refute the facts stated in respondent's complaint, but to assist his counsel as an advisor in conducting said trial; that affiant is not as well prepared to try the case without petitioner and therefore cannot safely proceed to trial without him. (R.T. XI-XII.)

There was no showing of opposition by respondent or his counsel by affidavit or otherwise to the foregoing affidavit of petitioner and his counsel.

The trial Court thereupon denied petitioner's motion for said continuance (R.T. XXII), ordering petitioner's counsel to remain in attendance at said trial after petitioner's counsel informed the Court that he would remain mute during said proceedings.

(c) The oral and documentary evidence.

Reference is herewith made to the evidence both oral and documentary offered by respondent at said trial:

Respondent was the first witness and testified. (R.T. 6 to 48 and 77 to 103.)

There was the testimony of respondent's wife and testimony by Paul W. Rathford, Elizabeth Venning

and Mary E. Kean. There was also testimony by one Lester G. King, a police officer.

The testimony of William P. Devou was taken under Section 2055 of the Code of Civil Procedure of the State of California. (R.T. 139.)

He testified in part (R.T. 140, 141), "I didn't have enough money to finance the litigation in Ohio and Mr. Rogers said he could borrow some, and I said all right go ahead and borrow it".

The witness identified his signature to Plaintiff's Exhibit 33 on two typewritten pages, which authorized petitioner to pay certain creditors of William P. Devou.

THE VERDICT AND THE TWO JUDGMENTS.

The jury as heretofore stated brought in a verdict in favor of respondent for $15,000 punitive damages and compensatory damages in the sum of $6399. (C.T. 79.)

Just prior to the submission of the case counsel for Devou made a motion for a nonosuit (C.T. 77) which was denied. Thereafter and on the following day respondent's counsel moved to dismiss said action against Devou. (C.T. 78.)

On December 4, 1952, the clerk of the Court entered judgment on the verdict in the sum of $21,939 and costs in the sum of $259. (C.T. 81.)

On December 17, 1952, petitioner filed a notice of intention to move for a new trial on all the statutory grounds. (C.T. 85.)

On January 16, 1953, the trial judge signed findings of fact and conclusions of law. (C.T. 90-91.)

On January 16, 1953, petitioner filed an affidavit in support of his motion for a new trial and a subsequent affidavit three days later annexing certain important documents thereto, in all twenty-three exhibits in support of his motion for new trial. (C.T. 92-128.)

No counteraffidavits were filed except by respondent's counsel and these dealt only with the denial of the motion for a new trial.

The affidavit of petitioner shows in a letter of the respondent that on December 1, 1943 respondent only claimed a loan of $3000 to Devou.

The affidavits and exhibits demonstrate that respondent was fully informed at the outset of the Ohio litigation of Devou.

No counter showing was made against petitioner's affidavits or exhibits in petitioner's request for a new trial, which was denied by operation of law.

Petitioner took appeals from both judgments. (C.T. 155, 162.)

ARGUMENT.

(a) NEITHER COUNT OF THE COMPLAINT STATES A CAUSE OF ACTION AGAINST PETITIONER FOR FRAUD OR OTHERWISE.

Stripped of its essentials and its rambling, redundant and vituperative verbiage, respondent's complaint is merely this:

That petitioner represented to him that petitioner had a good investment of a loan to Devou; that Devou's claims were in a contested probate action; that certain payments were made on said loan, which petitioner alleges was the sum of $3000 with a bonus of $1450 and which respondent claims was a loan of $4150 and that respondent received from petitioner a promissory note on July 23, 1948 in the sum of $5339.44 signed by Devou.

Devou testified for the respondent and did not deny his signature to the note.

The due date of the second note is not set forth in either count of the complaint.

There is no allegation that respondent refused to accept it.

There is no allegation in respondent's complaint that he ever tendered the note to Devou for payment or that such payment was ever refused or that Devou was insolvent and the note uncollectible.

The law presumes that a person is solvent and not insolvent. (*Hasenjaeger v. Voth,* 91 Cal. App. 394 at page 397; *Scholler Motors Co. v. Bankers' Trust Co.,* 216 Iowa, 1147, 247 N.W. 638; *Reithmuller v. Burton,* 176 Minn. 227, 222 N.W. 929; *Fidelity Union Trust Co. v. Matthews,* 128 N.J. Eq. 475, 17 Atl. (2d) 145. There is no presumption of insolvency. (*Zell v. Bankers Utilities Co.* (C.C.A. 9), 77 Fed. (2d) 22, 27.)

A reading of paragraph IV of the first count of the complaint and II of the second count will show at once that the alleged statements and representa-

tions were promissory in character and was not a representation of a past or present fact.

There is no allegation in either count that said statements were made in bad faith or without any intention of performing them.

Promissory representations are neither actionable nor matters for defense.

Representations made by the payee to the maker of a note as to the purposes for which he intends to use the note are but promissory representations as to future conduct and not false representations as to existing facts. (*Shaw v. McCaslin,* 50 Cal. App. (2d) 467, 471.)

The mere making of a promise which the promisor afterwards fails or refuses to perform does not constitute actionable fraud. (*Rheingan v. Smith,* 161 Cal. 362.)

In *Maynes v. Angeles Mesa Land Co.,* 10 Cal. (2d) 587, the Court said, at page 589:

> "The mere failure to carry out a promise is not a tort and it is therefore essential in pleading fraud consisting of false promise to allege the elements of fraud. (See *Rheingan v. Smith,* supra; *Ayers v. Southern Pac. R. Co.,* 173 Cal. 74, 79 (159 Pac. 144), L.R.A. 1917E 949; *Jacobson v. Mead,* 12 Cal. App. (2d) 75, 82 (55 Pac. (2d) 285).)"

(b) THE COMPLAINT SHOWS ON ITS FACE THAT EACH COUNT IS BARRED BY THE STATUTE OF LIMITATIONS.

The loan was made in 1941.

It is set forth in the complaint that respondent does not know whether Devou ever executed said note, but this again does not constitute actionable fraud. The mere promise to reduce a contract to writing and refusal or failure so to do does not constitute fraud. (*O'Brien v. O'Brien,* 197 Cal. 577.)

If the transaction was a mere loan not evidenced by an instrument in writing the statutory period would be two years from and after October, 1941; if a note was executed it would have been barred by the four year statute after the date of maturity of the note which would have been sometime in 1946.

If fraud is relied on by the respondent the facts and circumstances of such fraud, the date of its discovery and the reason why such discovery was not made sooner must be set forth and pleaded with particularity. A party seeking to avoid the bar of the statute of limitations on account of fraud must show that he used due diligence to discover it and should state when any particular discovery was made and why it was not made sooner. (*Lataillade v. Orena,* 91 Cal. 565.)

The presumption is always against fraud and one seeking relief against fraud must allege and prove it by clear and satisfactory evidence. (*Delcampo v. Camparillo,* 154 Cal. 647; *Shain v. Sresowich,* 104 Cal. 402; *Vertex Investment Co. v. Schwabacher,* 57

Cal. App. (2d) 406; *Grace v. Grace,* 89 Cal. App. (2d) 395.) The same rule applies to an action to recover damages for fraud. (*Nichols v. Moore,* 181 Cal. 131.)

Each count of the respondent's complaint is absolutely destitute of these vital and necessary allegations.

(c) THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO ESTABLISH FRAUD ON THE PART OF PETITIONER.

In the foregoing subdivision of this argument, it has been respectfully set forth the law applicable to actions where fraud is charged.

The same rules of course apply to the sufficiency of the evidence. It has been stated in innumerable decisions that fraud is odious and is never presumed (*Vander v. Roach,* 73 Cal. 614; *Gray v. Galpin,* 98 Cal. 633; *Simonton v. Los Angeles Trust & Savings Bank,* 205 Cal. 252; *Quindt v. Kilpatrick,* 96 Cal.App. (2d) 824; *Wilson v. Sampson,* 91 Cal.App.(2d) 453; also that the presumption against fraud approximates in strength that of innocence of crime, (*Michaels v. Pacific Soft Water Laundry,* 104 Cal.App. 366; *Truett v. Onderdonk,* 120 Cal. 581; *Traveler's Insurance Co. v. Beyers,* 123 Cal.App. 473; *Farmers Auto Exchange v. Calkins,* 39 Cal.App.(2d) 390; *Grundelfinger v. Mariposa Mining Co.* 72 Cal.App. (2d) 540.

Also that in action for damages for fraud, if there are two inferences equally reasonable and equally capable of being drawn from the proved facts, the

one favoring fair dealing and the other favoring corrupt practice, it is the express duty of the court or jury to draw the inference favorable to fair dealing. (*Ryder v. Bamberger,* 172 Cal. 791; *Truett v. Onderdonk,* supra; *Adkins v. Potter,* 211 Cal. 512; *Arakelian v. Sears,* 53 Cal.App. 646; *Williams v. Spazier,* 134 Cal.App. 340; *Raine v. Spreckels,* 54 Cal.App.(2d) 169.)

The District Court of Appeal in its opinion stated that petitioner stated to respondent "that he had an elderly client named Devou who had a large estate in Ohio, but was required to post a bond in a probate proceeding."

This point is made by the District Court of Appeal (127 A.C.A. 817):

> "Although the loan was to be made to Devou for a special purpose the money was not used for that purpose. The evidence is ample to support the construction that the money was used by defendant to generally finance litigation."

There is nothing in the record to justify either of these statements, so made by the Court.

There is not a word of testimony that petitioner ever stated that Devou was required to post a bond in the probate proceeding.

There is no mention of a bond or even any requirement for a bond in the reporter's transcript.

The only mention of such a bond is in respondent's complaint and that is obviously not evidence.

Accordingly one of the alleged false representations stands absolutely unproven.

As to another specification of falsity or representation by petitioner that "the court action in which Devou was interested was not merely for probate of the will of the father of William P. Devou and the distribution of his father's estate—but said action was a contested action to construe a will and for declaratory relief."

These representations are alleged to have been made on or about the month of October, 1941—this date is important.

Now the action for declaratory relief was not commenced by the sister of Devou until March 17, 1949—some seven years and four months after the money was lent by respondent.

Since the petitioner obviously could not have made false representations as to litigation which had not been commenced and which was not commenced until seven years after the alleged making of the alleged representations, it is quite obvious that the remaining alleged false representations, not only were not but could not have been made.

It must be remembered that in the present action respondent charged petitioner with fraud.

He induced a jury to penalize petitioner with punitive damages in more than double the amount of the compensatory damages, which he claimed and was awarded.

Therefore it is respectfully submitted that charges of fraud cannot rest on such indefinitive statements and conjectures.

It devolved upon the respondent to establish such fraud by clear and convincing evidence, that some material statement or fact or representation made by petitioner was false.

Respondent had access to the public records of the Probate Court in Ohio.

No such proof was offered that he had been misinformed by petitioner or that the status of the proceedings had been misrepresented to him.

The trial judge, and the District Court of Appeal alike, have absolutely failed to grasp the significance of this part of respondent's case.

Everything done said by petitioner after the making of the loan is a wholly false quantity in the case, as far as the issue of fraud is concerned. If the contract was made in good faith, the failure to perform it is not a fraud. (*Holiday v. Tolosano,* 39 Cal.App. 151; *Meehan v. Huntington Land and Improvement Co.,* 39 Cal.App. (2d) 349.

Mere failure to carry out a promise does not prove fraud in its making. (*Jacobson v. Mead,* 12 C.A.(2d) 75.)

It devolved on the respondent to establish something that amounted to fraud in this matter. Something that respondent has wholly failed to do. Courts do not exist to grant relief from an improvident

bargain, or to compensate one who has made an injudicious investment. Written instruments will not be cancelled on that ground. (*Parsons v. Smilie,* 97 Cal. 647; *Bretthauer v. Foley,* 15 C.A. 19; *Cherney v. Johnson,* 72 C.A. 725.)

(d) THE DISTRICT COURT OF APPEAL COMMITTED ERROR IN HOLDING THAT THE CASE INVOLVES AN ORAL, VOLUNTARY AND CONTINUING TRUST.

The language used at page 822 of the opinion of the District Court of Appeal is easily refutable.

The loan made by respondent to Devou certainly had none of the aspects of a trust.

The District Court of Appeal is in error when it holds that a confidential relationship existed between petitioner and respondent by reason of petitioner having acted as respondent's attorney on one occasion, but that relationship terminated in August, 1941, some two months prior to the Devou loan.

Where the relationship of attorney and client has ceased a transaction between them is valid and to avoid such transaction the former client must show that it was procured by fraud. (See *Foster v. Abrahams,* 74 Cal.App. 521.)

(e) THE INVALIDITY OF THE JUDGMENT AND PARTICULARLY THAT PORTION THEREOF WHICH AWARDS EXEMPLARY DAMAGES.

In such an action as this exemplary damages are not allowable at all.

Under the plain provisions of Section 3294 of the Civil Code of the State of California exemplary damages are allowable only "in an action for the breach of an obligation *not arising from contract* where the defendant has been guilty of oppression, fraud or malice, express or implied.

Here the action was for a breach of a contract to repay money loaned.

Here there is no suggestion that petitioner was guilty of oppression.

The element of malice either express or implied is equally lacking.

We have destroyed by what we have heretofore said that exemplary damages might be awarded because of fraud.

The record is destitute of fraud.

Under Section 3294 of the Civil Code of the State of California exemplary damages may not be recovered in an action based on a contractual obligation even though the breach of contract is wilful or malicious. (*Chelini v. Nieri,* 32 Cal.(2d) 480.)

To permit punitive damages where a party has partially performed his contract, before his breach is inconsistent with the provisions of the statute. (See

Freeman v. The Rector, Wardens and Vestrymen of St. Mary's Parish, 37 Cal.(2d) 16.)

We may add that we have never heard of an award for punitive damages for failure to pay a debt.

But it is submitted that the first judgment entered upon the verdict of the jury is wholly void.

This the District Court concedes, and after striking such judgment from the record and the purported appeal therefrom (appendix xxi) it thereupon attempts to breathe validity into such judgment by incorporating such void judgment in toto in the second judgment of January 16, 1953.

It is elementary that there can be but one judgment in any action. (*Estate of Jamison,* 31 Cal.(2d) 15.)

It is also the rule that where both legal and equitable issues are involved in the same action, the Court should first dispose of the equitable issues for two reasons, first because the disposition of such equitable issues may leave no legal issues to be determined and second because equity having once assumed jurisdiction will determine and dispose of the entire cause, even though the complete disposition thereof may involve the granting of a mere money judgment.

A court of equity having once acquired jurisdiction will adjust all differences between the parties. (*Sears v. Rule,* 27 Cal. (2d) 131; *Lewis v. Winfield,* 48 Cal. (2d) 543; *Majors v. Majors,* 70 Cal.App. (2d) 619; *Walsh v. Macaire,* 102 Cal.App.(2d) 435.)

We are presented in this case with a situation in which there are two judgments in the same action.

This cannot be.

There can be but one judgment in an action, no matter how many counts the complaint contains. (*Bank of America v. Superior Court,* 20 Cal. (2d) 697, 701.)

In *deValley v. Kendall de Vally Operalogue Co. Ltd.,* 220 Cal. 742, the court at page 745 said:

> "The law contemplates but one final judgment in a cause. As stated in the case of Nolan v. Smith, 137 Cal. 360, 361 (70 Pac. 166), quoting from Stockton etc. Works v. Glens Falls Ins. Co., 98 Cal. 577 (33 Pac. 633): 'There can be but one final judgment in an action etc.' (Citing authority.) See also Doudell v. Shoo, 159 Cal. 448 (114 Pac. 579); Middleton v. Finney, 214 Cal. 523 (6 Pac.2d 938), and Potvin v. Pacific Greyhound Lines Inc., 130 Cal.App. 510, 512 (20 Pac.2d 129.)"

If there are two judgments in a record the latter in point of time must be deemed the true and final judgment in the case. (*Galvin v. Palmer,* 134 Cal. 426, 428; *Paige v. Roeding,* 96 Cal. 388; *Von Schmidt v. Von Schmidt,* 104 Cal. 547; *Hawley v. Gray,* 127 Cal. 56.)

Accordingly the only judgment left standing in this matter is the one rendered by the trial judge in the sum of $6,939.

There is thus a legal exeunt of the exemplary damages.

It is unnecessary to argue further that the first judgment entered on the verdict of the jury was void.

The District Court of Appeal concedes that it was void. (*Alton v. Rogers,* 127 A.C.A. 810, 821.)

The Appellate Court has gone even farther than that; it has ordered the first judgment stricken from the record "and the purported appeal therefrom dismissed."

It then endeavors to give respondent his exemplary damages by ordering the void judgment which has just been stricken from the record, incorporated in the second judgment.

Such decision of the District Court of Appeal is void for want of jurisdiction.

CONCLUSION.

We believe that we have fully covered all of the grounds for a hearing on certiorari by this Court and it is respectfully submitted that without the slightest evidence of fraud, the District Court of Appeal has affirmed a void judgment of the Superior Court, not only holding petitioner liable for a debt he never did contract, but penalizing him with exemplary damages because the respondent had not collected the full amount of a promissory note.

It is respectfully submitted that this result finds no precedent in any reported decision and is unparalleled in the annals of judicial procedure.

It is likewise submitted that by denying petitioner an opportunity to be heard, the Superior Court deprived him of his property without due process of law and the equal protection of laws, within the meaning of the Fourteenth Amendment to the Constitution of the United States and petitioner has further been denied due process of law by the District Court of Appeal and deprived of his property by reason thereof, by said court declaring the first judgment void and striking it from the record and dismissing petitioner's purported appeal therefrom, and petitioner has been deprived of his property without due process of law by said District Court of Appeal incorporating said void judgment so dismissed in a second judgment against petitioner and granting respondent costs on both appeals, when it dismissed petitioner's appeal by reason of a judgment being void.

Wherefore, your petitioner respectfully prays this Honorable Court for an order granting a hearing on certiorari and that upon such hearing that the judgment of the District Court of Appeal of the State of California, First Appellate District, Division One thereof be reversed and the cause remanded to the Court below with directions to dismiss said action, and for petitioner's costs and for such other and fur-

ther relief, as may seem meet and proper in the premises.

Dated, Oakland, California,
February 21, 1955.

Respectfully submitted,
R. A. ROGERS,
Petitioner in Propria Persona.

(Appendix Follows.)